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In re Application of : **OFFICE OF PETITIONS**
Jeffrey Fergusson :
Application No. 10/601,024 : **DECISION ON PETITION**
Filed: March 8, 2004 :
Attorney Docket No. 114663-006 :

This is a decision on the "PETITION TO ASSIGN JUNE 20, 2003 AS THE FILING DATE," filed March 8, 2004. This petition is properly treated as a petition under 1.53(e)(2), requesting that the Office accord the above-identified application a filing date of June 20, 2003, rather than the presently accorded filing date of March 8, 2004.

The petition is **DISMISSED**.

Any request for reconsideration must be filed within TWO MONTHS of the mailing date of this decision. See 37 CFR 1.181(f). This time period is not extendable under § 1.136(a).

Petitioner maintains that the above-identified application was deposited in the Express Mail Post Office to Addressee service of the United States Postal Service on June 20, 2003, pursuant to 37 CFR § 1.10, and thus, is entitled to June 20, 2003 as a filing date. In support thereof, petitioner submitted a copy of the Express Mail mailing label used to transmit the application; an executed Certificate of Mailing; and affidavits of persons involved in the preparation of this application, Robert Barrett, Robert Buccieri, Karen Barrett and Renee Street.

A review of the application file confirms that this application was received in the Office by way of Express Mail as alleged, and has been accorded a date of receipt of June 20, 2003. However, on December 5, 2003, the Office mailed a "Notice of Incomplete Nonprovisional Application," informing applicant that the application had not been accorded a filing date because the application was deposited without a specification and drawings.

35 USC 111(a)(4) provides that:

the filing date of a nonprovisional application shall be the date on which the specification and any required drawing are received in the Patent and Trademark Office.

Petitioner is advised that a filing date of June 20, 2003 for the instant application is sought by way of petition under

§ 1.53(e)(2), not § 1.10¹. The specific issue is not whether petitioner has shown that the correspondence was deposited with the USPS on June 20, 2003, but rather whether petitioner has shown that the correspondence filed on that date included a specification and drawings and thus, is entitled to a filing date.

Petitioner's Certificate of Mailing is not persuasive as to the contents of the Express Mail envelope. The filing date of a paper filed in the United States Patent and Trademark Office (USPTO) is established by statute, 35 U.S.C. 111, and rule, 37 CFR 1.10, as either: (1) the date of actual receipt of the paper in the USPTO; or (2) the date of deposit in Express Mail service with the U.S. Postal Service (USPS). The date of deposit in the Express Mail service is shown by the date-in on the Express Mail mailing label. There is no question that the date of deposit is June 20, 2003. The Certificate of Mailing does not overcome the other evidence of record that a specification and drawings were not among the papers deposited on June 20, 2003.

The PTO file is the official record of the papers originally filed in this application. A review of the image file wrapper for this application reveals that the application papers received in the Office by way of deposit in Express Mail on June 20, 2003 included a five page transmittal and a three page declaration for patent. No specification or drawings were among the papers received. Since no specification and drawings are present in the file, it is concluded that no specification and drawings were filed. This conclusion is reaffirmed by the fact that the official file shows that the application transmittal letter received contains a notation made by a PTO employee that the PTO did not receive the specification and drawings identified on the application transmittal letter. This fact indicates that the specification and drawings were not misplaced in the PTO, since the PTO employee who opened the Express Mail envelope recognized.

¹ The specific rule for obtaining a filing date as of the date of deposit in "Express Mail" (rather than the date of receipt at the Office) is 37 C.F.R. § 1.10, as revised, effective December 2, 1996. 37 C.F.R. § 1.10(e) applies where correspondence deposited with the USPS as "Express Mail" is not received by the Office. However, § 1.10(e) applies only in those situations in which the correspondence at issue was lost *in toto* (i.e., the entire correspondence was not delivered to the Office). Where there is a dispute as to the contents of the correspondence submitted to the Office (e.g., an applicant asserts that three sets of drawings were submitted under 37 C.F.R. 1.10 with an application, but the Office records indicate receipt of only two sheets of drawings with the application), an applicant may not rely upon the provisions of 37 C.F.R. § 1.10(e) to establish what document(s) and/or fee(s) were filed in the Office with such correspondence. Rather, where the records of the Office (e.g., the file of the application) contain any document(s) or fee(s) corresponding to the contents of the correspondence at issue, the Office will rely upon its official record of the contents of such correspondence in absence of convincing evidence (e.g., a postcard receipt under MPEP § 503 containing specific itemization of the document(s) or fee(s) purported to have been filed with the correspondence at issue) that the Office received and misplaced any document(s) or fee(s) that is not among the official records of the Office. See MPEP 513, Rev. 1, Aug. 2001.

that the specification and drawings intended to be filed were missing.

An applicant alleging that a paper was filed in the PTO and later misplaced has the burden of proving the allegation by a preponderance of the evidence. The affidavits of Robert Barrett, Robert Buccieri, Karen Barrett and Renee Street relied on contain the affiants description of the procedures for filing applications with the Office and the recall of those routine events in this application, which occurred 9 months ago. These statements are not more persuasive than the record of what was filed as shown by the official file.

The best evidence of what was filed on June 20, 2003, is applicant's postcard. A postcard receipt which itemizes and properly identifies the items which are being filed serves as *prima facie* evidence of receipt in the Office of all items listed thereon on the date stamped thereon by the Office. See MPEP 503. Petitioner states that their procedure includes submitting a return postcard with the application papers; however, no postcard receipt has been submitted in support of this petition.

The application is presently entitled to a filing date of March 8, 2004, the date of receipt of a specification including at least one claim and drawings.

The application with a filing date of March 8, 2004, is being processed.

Telephone inquiries related to this decision should be directed to the undersigned at 703-305-0309.



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